HON'BLE THE CHIEF JUSTICE SRI G.S. SINGHVI

AND

HON'BLE SRI JUSTICE R. SUBHASH REDDY

Writ Appeals No.2308 and 2356 of 2005

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Writ Appeal No.2308 of 2005

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Between:

M/s.D.R. Hotels (Nellore) Pvt. Ltd., represented by its

Managing Director, K. Deepak Ram Reddy … Appellant

And

M/s.Nandhini Deluxe (a registered firm),

Bangalore and another.

… Respondents

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Counsel for the appellant: Sri O. Manohar Reddy

Counsel for Respondent No.1: Sri P. Venugopal and

Srinivas Dammalapati

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Counsel for Respondent No.2: Sri C.V. Mohan Reddy, The Advocate General

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Writ Appeal No.2356 of 2005

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Between:

Government of Andhra Pradesh, represented by

Its Principal Secretary(Political), General Administration Department, Secretariat, Hyderabad

… Appellant

And

M/s.Nandhini Deluxe (a registered firm),

Bangalore and another.

… Respondents

Counsel for the appellant: Sri C.V. Mohan Reddy, The Advocate General

Counsel for Respondent No.1: Sri P. Venugopal and

Sri Dammalapati

Counsel for Respondent No.2: Sri O. Manohar Reddy

:: JUDGMENT::

March 16, 2006

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Per G.S. Singhvi, CJ

These appeals are directed against order dated
17-11-2005 passed by the learned Single Judge in Writ Petition No.20432 of 2005 whereby he declared that writ petitioner – M/s. Nandini Deluxe (respondent No.1) and M/s.D.R.Hotels (Nellore) Private Limited (respondent No.2) are not qualified for being considered for award of catering contract and that the tender conditions do not envisage relaxation of essential eligibility criteria and directed the State Government to consider the remaining tenderers for award of contract.

For providing catering services in A.P. Bhavan at New Delhi, the State Government awarded contract to M/s Sai Caterers. Just before expiry of the term of its contract, in the month of August, 2005, M/s Sai Caterers represented to the Government for extension thereof, but the latter did not agree and it was decided to invite fresh bids. Accordingly, notice dated 3.8.2005 was issued inviting tenders from the interested parties. In all, 17 persons/institutions obtained tender schedules but only 8 of them submitted tender bids. The same were evaluated by a Committee constituted by the State Government. The committee comprised of Principal Secretary to Government (Poll), Secretary to Government (Finance), Joint Secretary to Government (T R & B), and Additional Secretary to Government (Protocol). The Committee met on 3-9-2005 and deliberated on the modalities for scrutinizing the technical bids and decided to adopt the following procedure:

> "**8.1** The documents submitted along with the Technical bid will be examined, for the following items and marks allotted for each head as under:

S.No.	Item	Max. Marks allotted under this head

	Mandatory	
	Whether the tenderer is incorporated /registered for F& B business	
	Turnover in the last financial year (Minimum Reqd., 2.5cr.)	10*
	Income Tax & Sales Tax / VAT certificates enclosed	
	OTHER QUALIFYING CONDITIONS	
	Existing outlets in India/branches	5
	Experience in preparing Veg. & Non-veg Andhra dishes	10
	Experience in managing/running Guest Houses/State Canteens	10
	Experience in dealing with reputed corporates	10
	Experience in dealing with high dignitaries & officials and non-officials of Govt.	15
	Quality Control Mechanism& systems adopted	15
	Certification from ISO/HACCP/other Agency	15
	Experience in catering services at Delhi	10
	TOTAL MARKS	100

*Min.marks will be '0'. (i.e., for 2.5 crores Turnover in the latest financial year). For every additional 0.5 crores Turnover, '1' mark will be allotted.

8.2 It has been decided by the Committee that a tenderer should get a **minimum of 50 marks**, out of the 100 marks, in order to qualify in the Technical Bid. As per the terms of the Tender Schedule, Financial bids shall be opened only in respect of those tenderers, who qualify in the Technical bid.

As a result of the evaluation of technical bids, eight tenderers got the following marks:

S.No.	Name of the Persons/Institution applied	Marks allotted(Out of 100 marks)
1.	M/s.Sri Haripriya Hotels Pvt. Ltd.,Railway Station Road, Cuddapah	**52**
2.	M/s.Ultimate Hospitality Services (Pvt)Ltd., Banjara Hills, Hyderabad	**63**
3.	M/s.Sri Laxmi Canteen,Hyderabad	23

4.	Sri Prakash Rao* (Swagat Group of Hotels)	20
5.	M/s.Nandhini Deluxe,Bangalore	33
6.	M/s.D.R. Uttama,Nellore	**55**
7.	M/s.Hotel Ram Prasad,Tamilnadu Guest House, New Delhi	33
8.	M/s.Sai Caterers,New Delhi	40

On the basis of the marks secured by the tenderers, the Committee decided to open the financial bids only of three bidders who secured minimum 50% marks. Accordingly, the financial bids of M/s Sri Haripriya Hotels Pvt.Ltd., M/s Ultimate Hospitality Services (Pvt.) Ltd., and M/s D.R. Uttama (represented by respondent No.2) were opened. The committee recommended award of contract to respondent No.2 because its bid was found to be highest.

Respondent No.1 challenged the decision of the Committee by filing writ petition under Article 226 of the Constitution of India. The pleaded case of respondent No.1 was that even though it fulfilled the eligibility conditions and its bid was far more competitive, the Committee arbitrarily excluded the same from the zone of consideration and in this manner its right to equality guaranteed under Article 14 of the Constitution has been violated. It was also alleged that the State Government had fixed additional criteria with a view to favour some of the parties.

In the counter-affidavit filed on behalf of the State Government, it was averred that the Committee constituted for evaluating the tender bids has decided to allot marks for different parameters under different heads and prescribed 50% as cut-off marks. The Committee also decided to allot marks only in respect of the qualifications of the tenderers which had bearing on the quality of the service to be provided and conditionalities like registration / incorporation and submission of tax documents had not been given any weightage. This criteria was uniformly applied to all the tenderers. The procedure for allotment of marks was explained to all the tenderers. The writ petitioner submitted tax documents showing turnover of Rs.2,48,98,584/- which was less than the prescribed turnover of Rs.2.50 crores. Notwithstanding this, the Committee gave benefit of doubt to the petitioner and did

not disqualify it on that ground. However, no marks could be awarded to the petitioner because there was no mention of quality control mechanism adopted and experience in running State Guest Houses/Canteens/State Bhavans. The petitioner could secure only 33 marks out of 100 and, therefore, its financial bid was not opened. Only three of the eight bidders were found to have achieved the minimum 50% marks. Their financial bids were opened and the highest bid of Rs.6,60,000/- given by respondent No.2 was recommended for acceptance.

M/s D.R. Hotels (Nellore) Private Limited, which had given tender bid in the name of D.R.Uttama, but was not made party to the writ petition filed W.P.M.P.No.26783 of 2005 for its impleadment. The same was allowed by the Court. Thereafter, respondent No.2 filed counter-affidavit to controvert the case set up by the petitioner. Therein, it was averred that the impleaded respondent is running 3 Star Hotel with sufficient experience in catering. It was selected as best 3 Star Hotel in the region by A.P. Tourism Department for the year 2004. It was further averred that the decision on technical bid was
revealed on 5-9-2005 when the marks awarded for each of the criteria mentioned in the special conditions of tender notice were announced. Thereafter, the financial bids of eligible tenderers were opened and the Committee recommended award of contract to the highest bidder.

The learned Single Judge after noticing the arguments of the counsel for the parties, the judgments of the Supreme Court in **Ramana Dayaram Shetty v. International Airport Authority**, **Kasturi Lal Lakshmik Reddy v. State of Jammu & Kashmir**, **Sterling Computers Limited v. M & N Publications**, **Tata Cellular v. Union of India**, **Air India Limited v. Cochin international Airport Limited**, **Godavari Polymers Pvt. Ltd. v. Agricultural Products Commissioner & Principal Secretary**, **Ram Gajadhar Nishad v. State of Uttar Pradesh**, **G.J. Fernandez v. State of Karnataka**, **Poddar Steel Corporation v. Ganesh Engineering Works**, **West Bengal Electricity Board v. Patel Engineering Corporation** , **GVPREL-MEE (JV) v. Government of A.P., Global Energy Limited v. Adani Exports Limited** and going through the records produced by the learned Advocate General, held that even though the power of judicial review does not entitle the Court to sit in appeal over the decision of the competent authority, the reasonableness and propriety of the action taken by the public authority can be gone into. The learned Single Judge further held that even though the writ petitioner does

not satisfy the condition of eligibility prescribed in para 2.2 (II) of the Tender Schedule, the exercise undertaken by the Committee to evaluate the tender bids was quite irrational and the same resulted in consideration of the tender bid of M/s D.R. Hotels, who was otherwise not eligible. Accordingly, declared the writ petitioner and respondent No.2 ineligible and directed that the bids of the remaining parties be considered. The relevant extracts of the order of the learned Single Judge, which indicate the process of reasoning adopted by him for nullifying the bid of respondent No.2 read as under:

> "… In a petition for judicial review, the Court cannot sit in appeal over the decision of the public authority and the Court is interested only to see that all the persons subjected to burdens and benefits received equal and fair treatment in a manner, which is not capricious and arbitrary. Whether the first respondent or tender committee has addressed the proper questions while undertaking the evaluation of the technical bids? Whether the allocation of marks by the tender committee is rational and unarbitrary? These are questions essentially concerned with the decision making process and not the decision itself. While reviewing such process, it would be necessary for the Court to subject various general conditions and special conditions to an analysis to arrive at a reasonable conclusion as to the intention of the first respondent in issuing such a tender notice. It is also necessary for the Court to see whether the tender committee has correctly appreciated the purport of each of the conditionalities whether they are general or special.
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> As noted above, the qualification data or eligibility criteria found in general condition 2.2 (i) read with special condition 4 (turnover criteria) and general condition 2.2 (ii) read with special condition 5 (experience criteria) are two pre-conditions of eligibility, which need strict compliance by all the tenderers. Tender authority is therefore required first to decide as to who are the persons who satisfy the essential mandatory conditions that is turnover criteria and experience criteria and then only take up the evaluation of bids with reference to other parameters. In this case, it was not done. Though the tender committee treated turnover criteria as one of the three mandatory conditions, the experience criteria was treated as "other qualifying conditions". This itself amounts to misdirection in law. It is not denied before this Court that out of eight tenders received only one of the tenderers satisfies pre-condition of eligibility in general condition 2.2 (ii) i.e., the experience in running canteens in State Bhavans/Government establishments. The whole exercise, therefore, suffers from this incurable defect in the decision making process. It is no doubt that the petitioner itself does not satisfy this condition but the petitioner, the second respondent and others were given relaxation of this condition and also with regard to special condition 9, which is only "desirable" criteria. The notification published in newspapers never indicated that the Government would grant relaxation of general conditions and special conditions. If only such condition was notified, there would have been better

persons/organisations with better qualifications who might have tendered for the contract. In **International Airports Authority** (supra), the Supreme Court considered such aspect of the matter and though did not grant any relief to the appellant and did not invalidate the contract awarded to fourth respondent therein, nevertheless found fault with the procedure adopted by the tender authority. For the same reasons, this Court is not able to approve the method adopted by the first respondent or tender committee in granting relaxation of precondition which has to be satisfied by all the tenderers.

The committee, which evaluated the tenders, identified "eight others qualifying conditions" besides three mandatory criteria. Curiously, while allotting marks, the mandatory criteria as discussed above were allotted low weightage and for other qualifying conditions, which were described in the tender notice as "desirable" or "preferred" qualifications were given more weightage. This is certainly irrational. It is accepted position in law that when essential qualifications are prescribed an incidentally it is specified that a given additional qualification or criteria is 'desirable' or persons with such specified additional criteria or qualifications would be 'preferred' to others, it only means that in the event of two persons achieving a similar bench mark or above bench mark, the persons with specified additional qualifications or criteria would be selected subject to other conditions of compliance. In the method adopted by the tender evaluation committee, however, this principle was ignored and therefore this is also one area where the decision making process suffers from incurable defect."

Sri C.V. Mohan Reddy, learned Advocate General and

Sri O. Manohar Reddy, learned counsel for M/s D.R. Hotels argued that in the face of adverse finding recorded by him on the issue of writ petitioner's (M/s.Nandini Deluxe) liability, the learned Single Judge could not have entertained its prayer for nullification of the recommendations made by the committee. They argued that once the learned Single Judge felt convinced that the writ petitioner was not eligible to participate in the process of award of contract, he should have dismissed the writ petition without going into other issues. The learned Advocate General then submitted that the view expressed by the learned Single Judge on the nature of the special conditions embodied in the Tender Schedule is ex facie erroneous because the same formed part of the conditions of eligibility specified in the Tender Schedule. He referred to paras 2.2, 2.3 of Part II of the Tender Schedule and para 4 of the special conditions to show that only that company/organisation could participate in the process of award of contract which had minimum turnover of Rs.2.5 crores per

annum for catering and F & B business during the last financial year and argued that the petitioner whose turnover for the year 2004-05 was to the tune of Rs.2,48,98,584/- was not eligible to be considered by the committee constituted by the State Government. He submitted that the exercise undertaken by the committee to award marks to the writ petitioner was futile because even after securing 50% marks, it could not have been considered for award of contract. Both, the learned Advocate General and Sri O. Manohar Reddy then argued that the committee did not commit any illegality by awarding marks to the bidders in accordance with the criteria which was uniformly applied to all the bidders. They emphasized that in the absence of any allegation of mala fides or patent arbitrariness, the learned Single Judge could not have nullified the recommendations made by the committee.

Learned counsel for M/s Nandini Deluxe supported the order under challenge. He argued that the mechanism evolved by the committee for award of marks to the bidders was totally arbitrary and irrational and the learned Single Judge did not commit any illegality by issuing a direction for reconsideration of the tenders submitted by the other bidders. On the issue of eligibility of his client, learned counsel submitted that even though the tax documents revealed its turnover to be Rs.2,48,98,584/-, as a matter of fact, the total turnover was more than Rs.2.5 crores. He pointed out that respondent No.1 had submitted certificate of the Chartered Accountant to show that its turnover was more than Rs.2.5 crores. Learned counsel then argued that award of 45 marks under four heads of experience is clearly indicative of the arbitrariness of the criteria adopted by the committee. He submitted that this was done with an ulterior motive of enhancing the marks of M/s D.R. Hotels.

We have thoughtfully considered the entire matter and carefully perused the record produced by the learned Advocate General.

A reading of the tender notice dated 3-8-2005 issued by Principal Secretary (Political), General Administration Department shows that eligibility of the bidders was to be determined with reference to special conditions. This is evinced from the note appended at the bottom of the tender notice, which reads as under:

"Eligibility: Please see the special conditions on page __"

Para 1.5, 2.0, 2.1, 2.2, 2.3, 2.4 of the tender notice and paragraphs 3, 4, 5, 6, 9 and 18 of the special conditions which have bearing on the decision of these appeals read as under:

"**1.5.**

Part-I: Contains general information, technical credentials and terms and conditions.

Part-II: contains Financial bid

Part II of only those parties who qualify the technical criteria in Part-I will be opened.

2.0 Procedure for submission of Tenders.

1. Tenders must be submitted in two different sealed cover and should be addressed to the Principal Secretary (Political), General Administration Department, A.P. Secretariat, Hyderabad – 500 022. The name of the work and name of contractor should be noted on each envelope.

2. The first cover shall contain the following qualification data:

The caterer must quote in the technical bid.

I. Maximum turnover year wise including Sales Tax as well as Income Tax paid in the last 3 years.

II. Experience of running of Canteens in State Bhavans, Government establishments, etc.

III. Any other documentary evidence in their support indicating his/her capability and experience to run such a Canteen.

The qualification details to be furnished along with attested copies of above documents should be put in the first cover and sealed and superscripted as "Qualification data". The financial bid for the work in question and the remaining tender schedule shall be put and sealed in the second cover and superscripted as "Financial bid".

3. While opening the tender, the sealed cover containing the qualification data will be opened first. Eligibility of contractor will be examined with reference to the documents mentioned in para 2.2.

4. The second cover containing the Financial bid will be opened of only those tenderers who are qualified. The financial bids of the tenderers who have not submitted all the details as per 2.2 and who have not qualified shall not be opened and they shall be kept in the sealed covers only.

Special Conditions:

3 . The party submitting the Tender should be a Company/organisation incorporated/registered for catering and Food & Beverage (F & B) business.

4. The Company/organisation shall have a minimum turnover of Rs.2.5 crore per annum for catering and F & B business during the last completed financial year.

5 . The party should have previous experience in preparation of Vegetarian and Non-Vegetarian Andhra Dishes.

6. The company/organisation should have a strong quality control mechanism for food safety and personal hygiene with mandatory audit by an outside professional agency. It should follow Hazard Analysis Critical Point (HACCP) or other best management practices for food safety. It is desirable that the Organisation has quality certification from ISO/HACCP/any other certifying agency.

9. It is desirable that the Organisation has previous experience in maintaining Guesthouses and providing catering services to reputed corporates.

18. The experience of the tenderer having dealt with Guest Houses Canteens in interface with officials, non-officials and also high dignitaries, would be given due weightage in selection. If required, the tenderer should arrange to show Canteen/Restaurant being run by him at present to the Resident Commissioner or to any other officials authorized by him or by Government of Andhra Pradesh."

A careful analysis of the above reproduced paragraphs shows that various sub-paragraphs of paragraph 2 contain the procedure to be followed for submission of tenders and details of the documents to be produced by the bidders. The conditions of eligibility are enumerated in paragraphs 3 to 6 of the special conditions whereas paragraphs 9 and 18 enumerate the conditions, which are desirable. If paragraphs 3 to 6 of the special conditions are read in conjunction with paras 2.2 and 2.3 of the tender notice, it becomes clear that only those tenderers were eligible to participate

in the process of award of contract who had a minimum turnover of Rs.2.5 crores per annum for catering and F & B business during the last completed financial year, who had previous experience of preparing Vegetarian and Non-vegetarian Andhra Dishes, and who had a strong quality mechanism for food, safety and personal hygiene. In order to establish eligibility, each tenderer was required to produce documents showing its turnover of the last three years' experience of running of canteens.

The tax documents produced by the writ petitioner (respondent No.1 herein) revealed that its turnover of the previous year was Rs.2,48,98,584/-. This clearly fell short of the prescribed turnover of Rs.2.5 crores and, therefore, it was not eligible to be considered for award of contract. Respondent No.1 did produce the certificate of Chartered Accountant showing a turnover of Rs.2,51,73,151/-, but, in the face of the tax document, the certificate of the Chartered Accountant could not have been taken into consideration for determination of its eligibility.

In our opinion, the tender submitted by respondent No.1 should have been rejected at the threshold. Notwithstanding this, the Committee considered the tender of respondent No.1 and awarded marks under various headings. However, this concession cannot annure to the advantage of respondent No.1 and gives locus to it to challenge the procedure adopted by the evaluation committee for award of marks to other bidders because it is settled law that a person who is not eligible to the award of contract etc., cannot complain of discrimination and cannot seek intervention of the Court for nullification of award of contract to other party – **Ramana Dayaram Shetty v. International Airport Authority (supra).**

We shall now consider whether the reasons assigned by the learned Single Judge for nullifying the recommendations made by the evaluation committee are legally untenable and the order under challenge is liable to be set aside.

The parameters for exercise of the power of judicial review in the matter of award of contracts etc. are well defined. It has been repeatedly held that Courts can only review the manner and mode adopted by the Government/public authority to arrive at a particular decision and not the decision itself. If the infirmity found in the decision making process affects the ultimate decision, then the Court can nullify the

decision and remand the matter to the concerned authority. However, it cannot sit as a court of appeal and substitute its opinion for the one formed by the competent authority. For the sake of reference, we may notice the judgments of the Supreme Court in **Ramana Dayaram Shetty v. International Airport authority** (supra), **Tata cellular v. Union of India** (supra), **Air India Limited v. Cochin International Airport Limited** (supra)**, Raunaq International Limited v. IVR Construction Limited** and **Master Marine Services (P) Ltd., v. Metcalfe & Hodgkinson (P) Ltd.**. After reviewing some of the judicial precedents on the subject, in **Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd.** (supra), the Supreme Court laid down the following propositions:

> "1) The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.
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> 2) Principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review. The modern trend points to judicial restraint in reviewing administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. Fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but must be free from arbitrariness not affected by bias or actuated by mala fides. Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.
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> 3) The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the Court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide

whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, should the court interfere.

4) The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations, which would include, inter alia, the price at which the party is willing to work, whether the goods or services offered are of the requisite specifications and whether the person tendering is of the ability to deliver the goods or services as per specifications. The State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation.

Reverting back to the order of the learned Singe Judge, we find that after noticing the limited scope of judicial review in such matters, the learned Single Judge opined that the experience criteria could not have been put under the heading of 'other qualifying conditions' for the purpose of award of marks and this amounted to mis-direction in law. The learned Single Judge was also of the view that the condition specified in para 2.2 of the tender schedule was an essential eligibility condition and this could not have been relaxed in the absence of any provision to that effect in the tender schedule. In our opinion, the view expressed by the learned single Judge on both the counts is ex facie erroneous. Firstly, para 2.2 of the tender schedule merely contain the procedure for submission of tenders and not the conditions of eligibility, which, as mentioned above, are enumerated in paras 3 to 6 of the special conditions. For determining whether the tenderer was qualified, one was required to look into the documents produced by the party in terms of para 2.2 of the tender schedule. By no stretch of imagination that para can be read as laying down conditions of eligibility. The allocation of marks made by the Committee shows that it had awarded separate marks under various heads, including experience. Merely because the qualifications of experience was put under the heading "the other qualifying conditions", it cannot lead to an inference that the committee had granted relaxation to the requirement of experience which was a condition of eligibility in terms of para 5 of the special conditions. The table of the marks awarded to various bidders including respondent No.2 M/s D.R. Uttama clearly shows that separate marks had been allotted under different headings of experience to all bidders and a uniform criteria was followed for assessing their worth. There is nothing in the allocation of marks from which it can be inferred that the committee

had acted arbitrarily or allocated excessive marks to respondent No.2 or did anything from which it can be inferred that it had acted with prejudice in favour of the said respondent. Therefore, the learned Single Judge was not justified in overturning the evaluation and recommendations made by the committee.

As a result of the above discussion, we hold that the order under challenge suffers from an error of law apparent on the face of the record. Consequently, the appeals are allowed. The order of the learned Single Judge is set aside. Respondent No.1 shall pay costs of Rs.10,000/- to the State Government because it has been prevented from completing the exercise of award of fresh catering contract for a period of over six months. The amount of costs shall be paid within a period of one month from today.

As a sequel to the allowing of appeals, the State Government shall now be free to award contract to the highest bidder.

G.S. SINGHVI, CJ

R. SUBHASH REDDY, J

March 16, 2006

Svs/vtv